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No. 218

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IN THE

Supreme Court of the United States

IDA BERRY, Individually and as Administratrix of the Goods, Chattels and Credits of OLIVIA MARSHALL, Deceased,
Petitioner-Plaintiff, Appellant,

vs.

FRANKLIN PLATE GLASS CORPORATION,
Respondent-Defendant, Appellee.

PETITION, BRIEF FOR PETITIONER AND APPENDIX.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS WHICH AFFIRMED THE ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

JOHN D. MEYER and
SIDNEY S. LEVINE,
Attorneys for Plaintiff,
450 Fourth Avenue,
Pittsburgh, Pa.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Supreme Court of the United States

Petition of IDA BERRY, Individually and as Administratrix of the Goods, Chattels and Credits of OLIVIA MARSHALL, deceased,

Petitioner and Plaintiff, Appellant,

against

FRANKLIN PLATE GLASS CORPORATION,

Respondent and Defendant, Appellee.

Petition.

The petitioner respectfully shows to this Court as follows:

1. The petitioner at the time of the commencement of this suit was a resident of the City of New York, residing at 500 West 170th Street, in the Borough of Manhattan, City and State of New York.

That the judgment sought to be reviewed herein was decided and entered in the office of the Clerk of the Circuit Court of Appeals, Third Judicial Circuit, on April 30, 1947, which affirmed the order of the District Court for the Western District of Pennsylvania, dated and entered the 11th day of June, 1946, dismissing the plaintiff's complaint for the reason that the plaintiff's cause of action was barred by the statute of limitations.

This action is filed by Ida Berry, individually and as Administratrix of the goods, chattels and credits of Olivia Marshall, deceased, against the Franklin Plate Glass Corporation.

It is set forth, *inter alia*, that during the year 1932, the defendant became the owner of a manufacturing plant at Butler, Pennsylvania and in connection therewith, engaged in the manufacture of plate glass. That in connection with the furtherance of said business, the defendant in the year 1932, and during the whole of the period set forth in the Complaint which gives rise to the alleged cause of action, discharged silica and waste from said plant in a careless, reckless and negligent manner. In addition thereto, the defendant caused the silica and waste to be stored or placed in high piles and banks within seven hundred (700) feet of the residence of Olivia Marshall, unprotected from the weather and natural elements in the vicinity.

That during the period beginning in 1932, and for many years prior to said year, and to April 1939, the deceased, Olivia Marshall, resided in one of the dwellings which was located within the distance of 700 feet of the location of the plant of the defendant Company and where the silica and waste were deposited. Between the years 1932 and April of 1939, the deceased, Olivia Marshall, not knowing the poisonous and obnoxious ingredients of said silica, which permeated the air in the vicinity of her home, was compelled to daily inhale great quantities of said silica. As a result of this condition, the respiratory system of the deceased was injured which caused her to permanently abandon her home in April of 1939, at which time she established a residence in the City of New York. The deceased continued to reside in the City of New York with her sister, Ida Berry, from April of 1939 until November 19, 1944, at which time it is claimed that as a result of the infection of the throat, lungs and respiratory system of the deceased, said conditions progressed to the extent that it resulted in the death of Olivia Marshall on November 19, 1944.

This cause of action was filed on October 2, 1946, and prior to the filing of an answer, the defendant filed its motion to dismiss the Complaint in which it is claimed that the Complaint fails to state a claim against the defendant upon which relief can be granted for the following reasons:

1. The Complaint shows that the claim was barred by the statute of limitations of two years of the State of Pennsylvania in such cases made and provided by reason of the fact that it appears that the last exposure of decedent to the alleged silica and waste was not later than April, 1939, and the Complaint was not filed until October 2, 1945.

2. The Complaint does not show a cause of action in Ida Berry individually.

3. The Complaint does not show any damages sustained by Ida Berry individually.

4. The Complaint does not set forth any damages sustained for which Ida Berry, Administratrix, is entitled to maintain an action.

The order of the District Court as well as the opinion of said Court clearly states that the Complaint was dismissed only on the ground that the causes of action alleged were barred by the statute of limitations. No opinion was delivered by the Circuit Court on the affirmance of this order.

Appellant contends that the statute did not begin to run until the death of the decedent, and it was pointed out that the hospital, nursing, medical and funeral expenses in this case were quite substantial as the illness spread over several years.

The questions presented on this petition are as follows:

1. Does the statute of limitations in an action for wrongful death run from the date of death or from the date of the infliction of the injury which resulted in death?

If this Honorable Court determines that the statute of limitations runs from the date of the infliction of the injury, then the following question arises.

2. Where the action is commenced by a personal representative instead of the next of kin of the deceased and the cause of action is limited to hospital, nursing, medical and funeral expenses and expenses of administration, does the statute of limitations in that type of action for wrongful death begin to run from the date of death of the deceased under the provisions of the Acts of the General Assembly of the Commonwealth of Pennsylvania known as Enactment No. 48 of 1937?

3. Does the interpretation of the Pennsylvania Statute of Limitations by the Courts below violate the petitioner's rights under the Fourteenth Amendment of the Constitution?

All these points were raised in the Court below.

The Circuit Court of Appeals of the Third Judicial Circuit held in the case of Western Union Telegraph Co. v. Preston, 254 Fed. 229, that in an action for wrongful death the statute of limitations begins to run from the date of death and not from the date of the injuries resulting in death, and this Court in that case denied the petition for a writ of certiorari to the Circuit Court of Appeals to review same (248 U. S. 585 No. 786).

Your petitioner has been advised that the denial by this Court of a writ of certiorari to review said case is tantamount to holding that the rule of law enunciated in Western Union Telegraph Co. v. Preston, *supra* is the law of the land.

The petitioner also stresses the point raised in the Courts below that one who causes the wrongful death of another and thereby deprives a widow or other survivors of support or other rights is liable therefor, and any statute depriving the widow or survivor of such right of recovery is confiscatory and in violation of the Fourteenth Amendment of the Constitution of the United States.

Hereto appended is a certificate of merit of Charles V. Halley, Jr., former President of the Bronx County Bar Association, and a member of this Bar, and who is of counsel for petitioner.

That hereto annexed is petitioner's brief on this application.

WHEREFORE, your petitioner prays this Honorable Court that a writ of certiorari be issued herein to the Circuit Court of Appeals for the Third Circuit in order that the issues of law herein may be reviewed by this Court.

That no previous application has been made for this or similiar relief.

Dated, New York, June 30th, 1947.

IDA BERRY,
Petitioner.

State of New York, }
County of New York. } ss.:

IDA BERRY, being duly sworn, deposes and says that she has read the foregoing petition; that the same is true to her own knowledge on information and belief, except as to the matters therein stated on information and belief and as to those matters she believes it to be true.

IDA BERRY.

Sworn to before me this
30th day of June, 1944.
M. Jay Meckler,
Notary Public, Kings County.
Bronx Co. Clks. No. 16, Reg. No. 162-M-8.
N. Y. Co. Clks. No. 220, Reg. No. 555-M-8.
Kings Co. Clks. No. 56, Reg. No. 357-M-8.
Commission expires March 30, 1948.

I hereby certify that I have examined the foregoing petition and in my opinion the above is well-founded and the case is one in which the prayer of the petitioner should be granted by this Court.

CHARLES V. HALLEY, JR.,
370 East 149th Street,
New York City,
Of Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

Petition of IDA BERRY, Individually and as Administratrix of the Goods, Chattels and Credits of OLIVIA MARSHALL, Deceased,

Petitioner-Plaintiff, Appellant,

vs.

FRANKLIN PLATE GLASS CORPORATION,

Respondent-Defendant, Appellee.

PETITIONER'S BRIEF ON PETITION FOR WRIT OF CERTIORARI.

Statement.

This is a petition for a writ of certiorari to the Circuit Court of Appeals of the United States for the Third Circuit, which on the 30th day of April, 1947, unanimously affirmed, without an opinion, the order of the District Court for the Western District of Pennsylvania, dated and entered the 11th day of June, 1946, dismissing the plaintiff's complaint for the reason that the plaintiff's cause of action was barred by the Statute of Limitations.

Facts.

The facts are as follows:

This action is filed by Ida Berry, individually and as Administratrix of the goods, chattels and credits of Olivia Marshall, deceased, against the Franklin Plate Glass Corporation.

It is set forth, *inter alia*, that during the year 1932, the defendant became the owner of a manufacturing plant at

Butler, Pennsylvania and in connection therewith, engaged in the manufacture of plate glass. That in connection with the furtherance of said business, the defendant in the year 1932, and during the whole of the period set forth in the Complaint which gives rise to the alleged cause of action, discharged silica and waste from said plant in a careless, reckless and negligent manner. In addition thereto, the defendant caused the silica and waste to be stored or placed in high piles and banks within seven hundred (700) feet of the residence of Olivia Marshall, unprotected from the weather and natural elements in the vicinity.

That during the period beginning in 1932, and for many years prior to said year, and to April 1939, the deceased, Olivia Marshall, resided in one of the dwellings which was located within the distance of 700 feet of the location of the plant of the defendant Company and where the silica and waste were deposited. Between the years 1932 and April of 1939, the deceased, Olivia Marshall, not knowing the poisonous and obnoxious ingredients of said silica, which permeated the air in the vicinity of her home, was compelled to daily inhale great quantities of said silica. As a result of this condition, the respiratory system of the deceased was injured which caused her to permanently abandon her home in April of 1939, at which time she established a residence in the City of New York. The deceased continued to reside in the City of New York with her sister, Ida Berry, from April of 1939 until November 19, 1944, at which time it is claimed that as a result of the infection of the throat, lungs and respiratory system of the deceased, said conditions progressed to the extent that it resulted in the death of Olivia Marshall on November 19, 1944.

Ida Berry instituted this action against the Franklin Plate Glass Corporation, in which a right of recovery is

claimed individually and as Administratrix of the Estate of her sister, Olivia Marshall. Said cause of action was filed on October 2, 1946, and prior to the filing of an answer, the defendant filed its motion to dismiss the Complaint in which it is claimed that the Complaint fails to state a claim against the defendant upon which relief can be granted for the following reasons:

1. The Complaint shows that the claim was barred by the statute of limitations of two years of the State of Pennsylvania in such cases made and provided by reason of the fact that it appears that the last exposure of decedent to the alleged silica and waste was not later than April, 1939, and the Complaint was not filed until October 2, 1945.

2. The Complaint does not show a cause of action in Ida Berry individually.

3. The Complaint does not show any damages sustained by Ida Berry individually.

4. The Complaint does not set forth any damages sustained for which Ida Berry, Administratrix, is entitled to maintain an action.

The order as well as the opinion of Court below clearly states that the Complaint was dismissed only on the ground that the causes of action alleged were barred by the statute of limitations.

Petitioner contends that the statute did not begin to run until the death of the decedent, and it was pointed out that the hospital, nursing, medical and funeral expenses in this case were quite substantial as the illness spread over several years.

POINT I.

Petitioner's cause of action was not barred by the Statute of Limitations and furthermore it was the intent of the Assembly of the Commonwealth of Pennsylvania in enacting Enactment No. 48 of 1937 that the Tolling of the Statute of Limitations, when suing for hospital, nursing, medical, funeral and expenses of administration caused by the wrongful injury resulting in death, should begin from death and not from the date the injuries were inflicted.

The Circuit Court of Appeals for the Third Circuit held in Western Union Telegraph Co. v. Preston, 254 Fed. 229, that under the Pennsylvania Act creating a cause of action for wrongful death the statute of limitations begins to run from the date of death and not from the date of injury resulting in death. This Court denied a petition for a writ of certiorari to review that case (248 U. S. 585 No. 786).

The District Court has held that this "is not sound law" for the reason that subsequent to that decision the Pennsylvania Court of last resort decided in Howard v. Bell Telephone Co., 306 Penn-State 518, in interpreting the original statute held that the statute of limitations runs from the date of the injury that resulted in death and not from the date of death.

It is manifest that the Courts below misapprehended petitioner's contention. The petitioner did not dispute the Pennsylvania Statute of Limitations. The petitioner now states that she is ready to stand or fall by the Pennsylvania Statute of Limitations, which states an action for wrongful death must be brought within one year after the death of the person who was injured and not thereafter (Act of April 26, 1855 P. L. 309, Section 2; 12 Purdon's Pennsylvania Statutes, Annotated, Section 1603).

Petitioner brought this action within a year after the death of the deceased and the action therefore cannot be barred under said statute. Under the latest decision on the point this Court has held in Chase Securities Corp. v. Donaldson, 325 U. S. 304, that the Statute of Limitations goes to matters of remedy and not to destruction of fundamental rights. In that case this Court said by Jackson, J.:

> "This court in Campbell v. Holt, (115 U. S. 602) adopted as a working hypothesis as a matter of constitutional law the view that the statute of limitation go to matters of remedy and not to destruction of fundamental rights."

Irrespective of everything that has been said pro and con on the subject, this seems to be the last word on that point. This being the law, then there is no weight to the contention of the respondents that the Federal Courts under the authority of Erie Railroad v. Tompkins, 304 U. S. 64, have surrendered to the State Courts their own judgment in an action commenced by reason of diversity of citizenship.

This Court has very clearly held in Guaranty Trust Company v. York, 326 U. S. 991, that Federal Courts even under Erie R. R. v. Tompkins, 304 U. S. 64 are not compelled to follow the interpretation of the State Courts on questions of remedies. In that case this Court said by Frankfurter, J.:

> "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State Court."

Thus this Court having held that the question of the statute of limitations is one of remedy and not of fundamental rights, and has further held that it does not become a rubber stamp for a State Court when it comes to defining remedies, it therefore follows that the law enunciated in

Western Union Telegraph Co. v. Preston, *supra,* and which was before this Court on a petition for a writ of certiorari, is still sound law and that the statute of limitations in all death actions commenced under the Pennsylvania Statute in the Federal Courts should be tolled from the date of death.

For the moment we will assume, for the sake of argument, that the Courts below interpreting the decisions of the United States Supreme Court were correct. However, the appellant contends that the Courts below fell into error in failing to take cognizance of the fact that Enactment No. 48 of 1937 of the General Assembly of the Commonwealth of Pennsylvania was enacted five years after the decision of the Pennsylvania Supreme Court in Howard v. Bell Telephone Co. *(supra);* and that it is apparent by said Act of the General Assembly that when the cause of action is instituted by a personal representative instead of the named next of kin and further when the cause of action is limited to hospital, nursing, medical, funeral expenses and expenses of administration caused by the wrongful death, that the statute of limitations in that type of action runs from death irrespective of the time when the tort was inflicted.

It must be remembered that even though a statute of limitations may bar a recovery for a tort, it has always been the law that the tort itself is never extinguished.

Chase Securities Corp. v. Donaldson, *supra.*

And under this principle it is manifest that the tort itself may continue even after the death of the injured party and that the General Assembly could even abolish the statute of limitations after it has run its course and thus reinstate a cause of action.

The General Assembly of the State of Pennsylvania were undoubtedly aware of the decision of the Supreme Court of their State in the case of Howard v. Bell Telephone Company, *supra,* and passed the Act with the intention that where the action is limited to hospital, nursing, medical, funeral and expenses of administration, the action could be commenced by the personal representative of the deceased as an original cause of action which resulted in the death of the deceased from a tort feasor even though the statute of limitations has tolled against the deceased, and that this cause of action is independent of the other cause of action that theretofore existed for wrongful death and with intent that this cause of action was an independent action, not dependent or contingent upon the theory that it was a continuing tort that had existed in favor of the deceased before he died.

Take for an illustration a tort feasor who shoots a man and he dies instantly. There never was a cause of action existing in the latter's favor, as he never lived to acquire it. Can it be said that the widow of such a man could not recover for the funeral expenses on the theory of Howard v. Bell Telephone Company, *supra,* or that the right of action in the deceased had been extinguished or never existed?

The 1937 Act of the General Assembly answered this question in the negative. It is ridiculous to assume that any law, statutory or substantive, could provide that a person has a right of action to sue for his own funeral expenses before he dies, and it is this ridiculous assumption that clearly shows the intent of the General Assembly in passing the Act of 1937 that this right of action for these limited purposes was not dependent upon the right of action existing in favor of the deceased prior to his death.

The Supreme Court of the State of Pennsylvania recognizes the distinction that the right of action was a new and independent cause of action as distinguished from the old cause of action which depended upon a continuing tort in favor of the deceased before his death, when it decided the case of Pizzuli Admr. v. D'Ambrosia, 344 Pa. State Reports 643. In that case the Court said by Stern, J.:

> "Under the present statutory law of Pennsylvania, if a suit for personal injuries is not brought during his life by the person injured, two actions may be brought after his death" (as they were in the present instance) "for the recovery of damages—one under the Acts of 1851 (section 19) and 1855, the other under the Act of 1937. Such actions are entirely dissimilar in nature."

With no decision in the State of Pennsylvania to the contrary this Court is at liberty again to follow its decision in the case of Western Union Telegraph Company v. Preston, *supra,* as the Act of 1937 was passed five years after the decision in Howard v. Bell Telephone Company.

The statute of the State of Pennsylvania requires that action for wrongful death must be commenced within one year from the death of the deceased.

The deceased died on November 10, 1944 and this action was commenced on October 2, 1945 within the statutory period of one year from the date of death. The case of Flynn v. N. Y., N. H. & Hartford Railroad Company, 283 U. S. 53 does in no way affect this interpretation of the Act of 1937, as that case merely construed a federal act which, unlike the Pennsylvania act, did not provide for a statute of limitations which should run from the date of death. But as said by the U. S. Supreme Court, the federal act provides that no action shall be maintained "unless commenced within two years from the day the cause of action accrued." Thus it was clear in that case that Congress

intended that the Statute of Limitations for the death action should begin to run "from the day the cause of action accrued" in favor of the deceased, and not from the date of death as provided for in the Pennsylvania Act and particularly the 1937 Act heretofore referred to, which created an entirely new and independent cause of action upon the death of the deceased.

POINT II.

One who causes the wrongful death of another and thereby deprives a widow or other survivors of support or other rights is liable therefor, and any statute depriving the widow or survivor of such right of recovery is confiscatory and in violation of the Fourteenth Amendment of the Constitution of the United States.

At common law there was no right of action for wrongful death and all statutory rights therefor date back to Lord Campbell's act. This was probably due to the fact that in early days of English common law when a married woman, who is the main sufferer when her husband departs this life, had no rights at common law or in equity to sue for support. Only the ecclesiastical courts could give her such relief.

The great progress of civilization and the advancement of modern jurisprudence since the enactment of Lord Campbell's act, coupled with the acquirement of full rights by a married woman to contract, sue in courts, and own property as freely as her husband, has undoubtedly furnished our Courts with sufficient new material to hold as a matter of common justice that one who negligently takes the life of another should compensate the widow or other dependent irrespective of any statute on the subject.

Although marriage is an institution in which the State is vitally interested, nevertheless, contract is the basis of the relationship.

The widow or survivor absolutely cannot sue for the tort committed on the husband, father or benefactor during his life. Only after his death can they commence an action for their loss and any statute, whether it be a statute of limitation or otherwise which prevents such a recovery, is confiscatory and violates the survivor's rights under the Fourteenth Amendment of our Constitution. Furthermore, any statute which does not give the survivor a reasonable time after death to commence an action for wrongful death of the one whom they were dependent upon for support is void as against public policy.

The interpretation placed upon the Pennsylvania Statute by the Courts below would destroy a widow's contractual right of support.

It was never intended that our Federal Courts should become a rubber stamp for a State Court.

Guaranty Trust v. York, *(supra)*.

It must be remembered that in the early days of common law in England there was not even any recovery for negligence. It was only after the steady advancement of the common law that such a right was recognized.

Neither Howard v. Bell Telephone Co., *(supra)* nor Flynn v. New York, New Haven & Hartford Ry., *(supra)* ever approached this subject from the viewpoint that the losing widow was being stripped of her rights under the Fourteenth Amendment.

It is therefore respectfully submitted that aside from the petitioner's right to a reversal under "Point I" of this

brief, this Court should go one step further and hold that modern jurisprudence has kept apace with the advancement of civilization and hold that one who negligently takes the life of another is civilly liable for damages to the dependents and personal representatives of the deceased; and that any statute which directly or indirectly deprives the survivor of this right is not only void as against public policy but violates the Fourteenth Amendment of the Constitution.

POINT III.

The application for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. MEYER,
SIDNEY S. LEVINE,
Attorneys for Appellant.

CHARLES V. HALLEY, JR.,
Of Counsel.

APPENDIX

Docket Entries.

1945

Oct. 2 Complaint filed.

" 2 Summons issued.

" 8 Summons returned served with copy and complaint on L. F. Kummer, Asst. Secretary and Treasurer, for Franklin Plate Glass Corporation, at Butler, Pa., on Oct. 4, 1945 at 8:35 A. M.

" 16 Praecipe for appearance of John M. Reed, Esq., for defendant, filed.

" 17 Motion to dismiss, notice and acceptance of service filed.

1946

June 11 Opinion by Gourley, J., filed and order of Court entered granting motion of defendant to dismiss the complaint.

" 11 Pursuant to Opinion and Order, case is hereby dismissed.

G. H. Berger,
Clerk.

July 8 Notice of Appeal filed by attorney for plaintiff.

" 8 Copy of Notice of Appeal mailed to Wm. P. Rowland, Clerk C. C. A. and to opposing counsel.

Nov. 21 Order of Court entered directing the Clerk of Court to correct a typographical error in said Opinion by deleting the word "authoritative", on page 11, line 18, after the word "Not" and before a comma in said line, and substitute in lieu thereof "alternative" filed.

Notice of Appeal.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

IDA BERRY, Individually and as Administratrix of the goods, chattels and credits of OLIVIA MARSHALL, deceased, *Plaintiff*, vs. FRANKLIN PLATE GLASS CORPORATION, *Defendant*.	Civil Action No. 5035.

PLEASE TAKE NOTICE that the plaintiff hereby appeals to the Circuit Court of Appeals of the United States, Third Circuit, from the order of this court dated the 11th day of June, 1946, granting the defendant's motion to dismiss the complaint, and the plaintiff hereby appeals from each and every part of said order.

Dated, New York, July 2, 1946.

Yours, etc.,

JOHN D. MEYER AND SIDNEY S. LEVINE,
Attorneys for Plaintiff,
450 Fourth Avenue,
Pittsburgh, Pa.

To:
John M. Reed, Esq.,
2122 Farmers Bank Building,
Pittsburgh 22, Pa.

Clerk of the U. S. District Court,
For the Western District of Pennsylvania.

Motion to Dismiss.

The defendant moves the court as follows:

To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted for the following reasons:

1. The complaint shows that the claim was barred by the statute of limitations of two years of the State of Pennsylvania in such cases made and provided by reason of the fact that it appears that the last exposure of decedent to the alleged silica and waste was not later than April, 1939, and complaint was filed October 2, 1945.

2. The complaint does not show a cause of action in Ida Berry individually.

3. The complaint does not show any damages sustained by Ida Berry individually.

4. The complaint does not set forth any damages sustained for which Ida Berry, Administratrix, is entitled to maintain an action.

JOHN M. REED,
Attorney for Defendant,
2122 Farmers Bank Bldg.,
Pittsburgh (22), Pa.

Complaint.

Plaintiff as and for her complaint against the defendant shows to this court and alleges:

FIRST: That on the 20th day of September, 1945, the plaintiff was duly appointed administratrix by the Sur-

rogate's Court of the County and State of New York, of the goods, chattels and credits of Olivia Marshall, deceased.

SECOND: Upon information and belief, that at the times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania.

THIRD: That at the time of the death of the deceased and at the present time the plaintiff was and is a resident of the State of New York.

FOURTH: That the amount of the controversy herein is over the sum of Three Thousand Dollars exclusive of costs and interest.

FIFTH: That on or about and during the year 1932 the defendant became the owner of a large plant at Butler, Pennsylvania, manufacturing plate glass.

SIXTH: That the deceased, Olivia Marshall, was a sister of the plaintiff and departed this life on the 10th day of November, 1944, and that the plaintiff is the sole surviving next of kin of said deceased.

SEVENTH: That the plaintiff and the deceased were the owners in fee of certain premises situated about six hundred feet from the plant of the defendant and located at the southwest corner of Donahy Street and Short Street in Butler, Pennsylvania, and by reason of the death of the deceased as aforesaid, plaintiff Ida Berry became and now is the sole owner of said premises.

EIGHTH: That said property has for many years last past contained two houses used for residential purposes, and that the deceased resided in one of said houses from about 1892 to December 12, 1938.

NINTH: That the defendant from about 1932 to the present time has been manufacturing plate glass on a large scale in said plant and as a result of said manufacturing discharged silica and waste from said plant and carelessly, recklessly and negligently piled and continues to pile said silica and waste in high piles and banks within seven hundred feet of the above described premises, unprotected from the wind and gales of the natural elements in the vicinity.

TENTH: That the maintenance of said piles and banks of silica as aforesaid created and creates a nuisance not only to the property owned by the plaintiff and the deceased but to the general community.

ELEVENTH: That said silica and waste is a fine dust and contains tiny sandlike particles, which easily respond to the movements of the winds and gales, particularly within a radius of 1500 feet of said banks or piles, which said banks or piles of silica were discharged and maintained and suffered to exist by the defendant within a distance of 700 feet from the property wherein the said deceased resided as aforesaid.

TWELFTH: Upon information and belief, that the said silica is the refuse of ground glass which results from the manufacture of the plate glass in the defendant's premises and contains poisonous particles, which when blown by the wind so permeates the atmosphere within a radius of 1500 feet of the defendant's plant that it is impossible for any one to breathe without inhaling large quantities of said silica, which enters the nose, mouth, throat and lungs of the person so inhaling same.

THIRTEENTH: Upon information and belief, said silica contains many particles of poisonous substances which entering the lungs or respiratory system of the person

so inhaling same will aggravate the membrane of the lungs and respiratory organs causing serious repercussion and injury to the respiratory system of the one inhaling same.

FOURTEENTH: That the deceased resided at her home at the premises aforesaid between the years 1932 and 1938 and not knowing the poisonous and obnoxious ingredients of said silica which permeated the air in the vicinity of her home, was compelled to daily inhale great quantities of said silica, which entered and injured the respiratory system of the deceased, causing the deceased to permanently abandon her home at the aforesaid premises in April, 1939, and thereupon she removed to the City of New York with the plaintiff.

FIFTEENTH: Upon information and belief, said silica, which the deceased was compelled to inhale by reason of the said negligence and nuisance of the defendant, so infected the throat, lungs and respiratory system of the deceased that her entire respiratory system became diseased, which disease progressed until it resulted in the death of deceased on the 10th day of November, 1944.

SIXTEENTH: Upon information and belief, that defendant at all times since it manufactured said glass at said premises knew that said refuse and silica was dangerous to persons living in the community and that the inhaling of same as the result of said silica permeating the atmosphere was dangerous and injurious to the respiratory system of persons living in the vicinity.

SEVENTEENTH: That the plaintiff Ida Berry, the sister of the deceased, resided with the deceased in the City of New York from the time the deceased was compelled to leave the City of Butler, Pennsylvania, in or about the month of April, 1939, as a result of the defendant's failure to remove said banks and piles of silica or to take other

measures necessary to prevent the atmosphere from being permeated therewith, until her death on November 10, 1944.

EIGHTEENTH: That from in or about April 1939 until the death of the deceased on November 19, 1944, the deceased resided in the plaintiff's household and rendered various items of service to her and assisted her in her household duties and was a great source of comfort and aid to the plaintiff.

NINETEENTH: That the injuries sustained by the deceased, which resulted in her death as aforesaid, were wholly and solely due to the carelessness, negligence and nuisance of the defendant and free from any contributory negligence on the part of the deceased or the plaintiff.

TWENTIETH: That by reason of the aforesaid, the plaintiff has been damaged in the sum of Seventy-Five Thousand Dollars ($75,000.00).

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Seventy-Five Thousand Dollars ($75,000.00) besides the costs and disbursements of this action.

JOHN D. MEYER AND SIDNEY S. LEVINE,
Attorneys for Plaintiff,
Office & P. O. Address,
St. Nicholas Building,
Pittsburgh, Pennsylvania.

In the Southern District of New York,)
City and County of New York.) ss.:

IDA BERRY, being duly sworn, deposes and says, that she is the plaintiff in the within action; that she has read the foregoing complaint and knows the contents thereof

and that the same is true of her own knowledge except as to matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

IDA BERRY.

Sworn to before me this 26th day of September, 1945.

State of New York, }
County of New York. } ss.:

No. 49409

I, ARCHIBALD R. WATSON, County Clerk and Clerk of the Supreme Court, New York County, the same being a Court of Record having by law a seal, DO HEREBY CERTIFY that M. JAY MECKLER whose name is subscribed to the annexed deposition, certificate of acknowledgment or proof, was at the time of taking the same a Notary Public acting in and for said County, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certificate of his appointment and qualification as a Notary Public for the County of Kings with his autograph signature; that as such Notary Public he was duly authorized by the laws of the State of New York to protect notes, to take and certify depositions, to administer oaths and affirmations, to take affidavits and certify the acknowledgment or proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this State. And further, that I am well acquainted with the handwriting of such Notary Public, or have compared the signature of such officer and his autograph signature filed in my office, and

believe that the signature to the said annexed instrument is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 1 day of Oct., 1945.

ARCHIBALD R. WATSON,
County Clerk and Clerk of the Supreme Court, New York County.

Opinion of the Court Granting Defendant's Motion to Dismiss Complaint.

WALLACE S. GOURLEY, *District Judge:*

This case comes before the Court on defendant's motion to dismiss the Complaint for the reason that the Complaint fails to set forth a cause of action against the defendant upon which relief can be granted.

This action is filed by Ida Berry, individually and as Administratrix of the goods, chattels and credits of Olivia Marshall, deceased, against the Franklin Plate Glass Corporation.

It is set forth, *inter alia,* that during the year 1932, the defendant became the owner of a manufacturing plant within the jurisdiction of this Court and, in connection therewith, engaged in the manufacture of plate glass. That in connection with the furtherance of said business, the defendant in the year 1932, and during the whole of the period set forth in the Complaint which gives rise to the alleged cause of action, discharged silica and waste from said plant in a careless, reckless and negligent manner. In addition thereto, the defendant caused the silica and

waste to be stored or placed in high piles and banks within seven hundred (700) feet of the residence of Olivia Marshall, unprotected from the weather and natural elements in the vicinity.

That during the period beginning in 1932, and for many years prior to said year, and to April 1939, the deceased, Olivia Marshall, resided in one of the dwellings which was located within the distance of 700 feet of the location of the plant of the defendant Company and where the silica and waste were deposited. Between the years 1932 and April of 1939, the deceased, Olivia Marshall, not knowing the poisonous and obnoxious ingredients of said silica, which permeated the air in the vicinity of her home, was compelled to daily inhale great quantities of said silica. As a result of this condition, the respiratory system of the deceased was injured which caused her to permanently abandon her home in April of 1939, at which time she established a residence in the City of New York. The deceased continued to reside in the City of New York with her sister, Ida Berry, from April of 1939 until November 19, 1944, at which time it is claimed that as a result of the infection of the throat, lungs and respiratory system of the deceased, said conditions progressed to the extent that it resulted in the death of Olivia Marshall on November 19, 1944.

Ida Berry instituted this action against the Franklin Plate Glass Corporation, in which a right of recovery is claimed individually and as Administratrix of the Estate of her sister, Olivia Marshall. Said cause of action was filed *on October 2, 1945,* and prior to the filing of an answer, the defendant filed its motion to dismiss the Complaint in which it is claimed that the Complaint fails to state a claim against the defendant upon which relief can be granted for the following reasons:

1. The Complaint shows that the claim was barred by the statute of limitations of two years of the State of Pennsylvania in such cases made and provided by reason of the fact that it appears that the last exposure of decedent to the alleged silica and waste was not later than April, 1939, and the Complaint was not filed until October 2, 1945.

2. The Complaint does not show a cause of action in Ida Berry individually.

3. The Complaint does not show any damages sustained by Ida Berry individually.

4. The Complaint does not set forth any damages sustained for which Ida Berry, Administratrix, is entitled to maintain an action.

There are three questions before the Court for consideration:

1. Under the Federal Rules of Civil Procedure, is it permissible to raise the question of the statute of limitations by a motion to dismiss?

2. Is the Federal Court bound to follow the construction placed by the Supreme Court of the Commonwealth of Pennsylvania upon the laws of the Commonwealth?

3. Under the laws of the Commonwealth of Pennsylvania, does the plaintiff in either her individual or administrative capacity have a right of action against the defendant?

In connection with the pleading of the statute of limitations and the motion to dismiss, Rule 9(f) of the Federal Rules of Civil Procedure provides:

"(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and

place are material and shall be considered like all other averments of material matter."

Rule 8(c) of the Federal Rules of Civil Procedure provides, *inter alia,* that in pleading to a preceding pleading, a party shall set forth affirmatively the statute of limitations if it constitutes an affirmative defense and has application to the facts at issue.

It has been held by this Court that where the allegations of time and place are averred in a pleading, whether a claim is barred by the statute of limitations may be determined by a motion to dismiss. *Hartford-Empire Co. v. Glenshaw Glass Co.,* 47 F. Supp. 711.

It has also been held by the Supreme Court of the United States in the case of *Flynn, Executor, v. New York, New Haven, and Hartford Railroad Co.,* reported in 283 U. S. 53, that the Employers' Liability Act gives a right of action to the employee, or, in case of his death, to his personal representative for the benefit of the widow and children, and provides that no action shall be maintained unless commenced within two years from the day the cause of action accrued, and the right of a representative of an estate is derivative. As a result thereof, the right of action depends upon the continuance of a right in the injured employee at the time of his death, so if the right of the employee was extinguished before he died, by the lapse of the prescribed period, there was no right in his executor, on behalf of his widow and children.

It, therefore, appears that the decision of the Circuit Court, upon which absolute reliance has been placed by the plaintiff, has been overruled by the Supreme Court of the United States. However, it is necessary for the Court to first decide whether the interpretations of the Acts of

Assembly should be made by this Court or if we are bound by the interpretations made by the courts of the Commonwealth of Pennsylvania.

It, therefore, is the opinion of the Court that the matters presented in the motion for dismissal are properly before the Court.

It is contended by counsel for the plaintiff that the Complaint filed by the plaintiff, in both an individual and administrative capacity, is in accordance with the provisions of the law in the Commonwealth of Pennsylvania, and that the Court has jurisdiction of the cause of action by virtue of a decision of the Circuit Court in this District, in the case of *Western Union Telegraph Co. v. Preston,* 254 F. 229.

The defendant contends that the cause of action filed by the plaintiff, in both her individual and administrative capacity, is barred by the statute of limitations and that no right of recovery, therefore, exists.

It is true that the Circuit Court in this District in the case of *Western Union Telegraph Co. v. Preston,* reported in 254 F. 229, held that the statute of limitations in a death case runs from the time of death and not from the date of the original tort which resulted in the decedent's death. It further appears that at the time this decision was filed by the Circuit Court, the question as to when the statute of limitations in a death case commences to run had never been interpreted by the Supreme Court in this Commonwealth. It further appears that said question had not been decided by the Supreme Court of the United States at the time the interpretation was made by the Circuit Court of Appeals in this District. However, this question has been presented to the Supreme Court of the United States,

both as a general proposition of law and in an interpretation of a similar federal statute under the Merchant Marine Act as supplemented by the Employers' Liability Act.

In the case of *Engel v. Davenport et al.*, 271 U. S. 33, it was held, *inter alia,* that a provision which provides that no action shall be maintained unless commenced within two years from the day the cause of action accrued, is one of substantive right, both setting a limit and necessarily implying that the action may be maintained, as a substantive right, within a period of two years.

The plaintiff has filed her cause of action in the District Court solely on the basis of diversity of citizenship, and the alleged right of recovery is not derived in any respect by virtue of any laws of the United States, said right of recovery, if any, being based on the laws of the Commonwealth of Pennsylvania. A question, therefore, arises whether or not a statute of limitations concerns merely the manner and the means by which a right to recovery, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to the problem, namely, does it significantly affect the result of litigation for a Federal Court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a state court.

Conventional conflict of laws' characterization of matters as "procedural" or "substantive" has little, if any, bearing upon whether a federal court in a diversity of citizenship suit is or is not to apply state law in cases where there is no applicable Federal Rule of Civil Procedure. In such case it is more important and desirable for federal courts to achieve uniformity with State administration of

state law. *Palmer v. Hoffman,* 318 U. S. 109; *Stoner v. New York Life Insurance Co.,* 311 U. S. 464.

It appears to me that it would be a mischievous practice to disregard state statutes of limitations whenever federal courts think that the result of adopting them may be inequitable. Such procedure would promote the choice of the United States rather than of state courts in order to gain the advantage of different laws. In other words, in all cases where the federal court is exercising jurisdiction solely because of the diversity of the citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court.

As the matter intimately affects recovery or nonrecovery, a federal court in a diversity case must follow the State law since it is more important than desirable for federal courts to achieve uniformity with state administration of State law. This objective cannot be achieved if the federal court is free to make determinations independent of state law, where freedom will, almost as a matter of law, yield a result substantially different from that which would have been obtained in the state where the federal court sits. For example, if the federal court and the State court would be situate in adjoining buildings, and the action would have been filed in the state court, one rule of law would have application; while if the party litigant filed his action in the federal court, another rule of law would have application. The critical test, therefore, is whether an important difference in result will be made possible if state law is not applied. If a different result would arise under the same facts and circumstances, the state law should control.

I believe that the former decision of the Circuit Court in this District is not sound law, and the Circuit Court specifically overruled in the case of *Overfield v. Pennroad Corp.*, 146 F. 2d 889, the proposition of law formerly enunciated in the case of *Western Union Telegraph Co. v. Preston*, 254 F. 229.

Our Circuit Court held, *inter alia*, that a cause of action becomes cognizable in a Federal Court sitting in Pennsylvania because it would be likewise cognizable in a court in the State of Pennsylvania. However, the Federal Court is not to be relieved of the interpretation which the Pennsylvania Court would be bound to make if pleaded, since a right under Pennsylvania law would then be accorded to Federal Court litigants which they would not enjoy in a court of the State.

In the case of *McClaskey v. Harbison-Walker Refactories Co.*, 138 F. 2d 493, which was also a decision in the Circuit Court of this jurisdiction, the Court held that the decisions of the Supreme Court of Pennsylvania, upon questions of construction of the Constitution of Pennsylvania and of Pennsylvania statutes, is binding upon the Federal Court in determining rights accruing under Pennsylvania law. It is only when no alternative determination of questions involving the construction of Pennsylvania statutes have been made by the Supreme Court of Pennsylvania, or by any other appellate tribunal and the trial courts are in disagreement, does the Federal Court determine what construction should be placed on the interpretation of a statute.

This construction was also made by the Supreme Court of the United States in the case of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, in which the Court held, *inter alia*, that a federal court exercising jurisdiction over a case sole-

ly on the ground of diversity of citizenship is not free to treat this question as one of so-called "general law", but must apply the state law as declared by the highest state court. That except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern.

A similar question also arose in the Supreme Court of the United States in the case of *Guaranty Trust Co. v. York*, 326 U. S. 99, in which the opinion of the Court in the case of Erie Railroad Co. v. Tompkins was re-affirmed and in which the Court held that a suit in equity in a Federal Court to recover upon a state created right, jurisdiction being based upon diversity of the citizenship of the parties, a recovery cannot be had if the statute of limitations would have barred the recovery had the suit been brought in a court of the state.

It, therefore, appears to this Court that we are bound to follow the interpretation which has been placed on the Acts of Assembly, which give rise to the alleged right of recovery in the instant case and due deference to the state law, as declared by the highest court of this state, will govern.

It is now necessary to consider the various Acts of Assembly of the Commonwealth of Pennsylvania which give rise to the causes of action which have been filed in the instant case.

The Act of March 27, 1713, P. L. 76, provides for the right of an injured party to a cause of action for personal injuries, and limited the time to bring suit to within two

years next after the cause of such action or suit arose and not thereafter. Said Act of Assembly was amended by the Act of June 24, 1895, P. L. 236, Section 2, 12 Purdon's Penna. Statutes Annotated, Section 34, in which it is provided as follows:

> "Every suit hereafter brought to recover damages for injury wrongfully done to the person, in cases where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death, the limitation of action shall remain as now established by law."

Under the Act of April 26, 1855, P. L. 309, Section 2, 12 Purdon's Penna. Statutes Annotated, Section 1603, it is provided that where a person dies as a result of an injury, the declaration or complaint shall set forth or state who the parties are that are entitled to recover damages as a result of said accident; and said action shall be brought within one year after the death of said person who was injured, and not thereafter. Where death occurs as a result of personal injuries, and an action is not brought during the life time of the person injured, two separate actions may be brought after death for the recovery of damages, subject to the limitations set forth in the Acts of Assembly hereinabove referred to.

Under the provisions of the Act of April 15, 1851, P. L. 669, Section 19, and the Act of April 26, 1855, P. L. 309, as amended by the Act of June 7, 1911, P. L. 678, Paragraph 1, as amended by the Act of April 1, 1937, P. L. 196, Paragraph 1, 12 Purdon's Penna. Statutes Annotated, Section 1602, it is provided as follows:

> "The persons entitled to recover damages for any injuries causing death shall be the husband, widow,

children, or parents of the deceased, and no other relatives; and that such husband, widow, children or parents of the deceased shall be entitled to recover, whether he, she, or they be citizens or residents of the Commonwealth of Pennsylvania, or citizens or residents of any other State or place subject to the jurisdiction of the United States, or of any foreign country, or subjects of any foreign potentate; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors under the laws of this Commonwealth. If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death."

Under the provisions of the Act of July 2, 1937, P. L. 2755, Paragraph 2, 20 Purdon's Penna. Statutes Annotated, Paragraph 772, it is provided as follows:

"Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.

All such rights of action which were not barred by the statutes of limitation at the time of the death of decedent may be brought against his executors or administrators at any time within one year after the

death of the decedent, notwithstanding the provisions of any statutes of limitations whereby they would have been sooner barred."

The last two Acts of Assembly just cited were construed by the Supreme Court of the State of Pennsylvania in the case of *Pizzulli, Admr., Appellant v. D'Ambrosia,* 344 Pa. State Reports 643, in which the Court held, *inter alia,* as follows: If a suit for personal injuries is not brought during the life time of the person injured, two actions may be brought after the death of said person for the recovery of damages; one for the recovery of damages under the Act of April 15, 1851, P. L. 669, Section 19, and the Act of April 26, 1855, P. L. 309, as amended by the Act of June 7, 1911, P. L. 678, Paragraph 1, as amended by the Act of April 1, 1937, P. L. 196, Paragraph 1, and the other under Act of July 2, 1937, P. L. 2755, Paragraph 2.

Such actions are entirely dissimilar in nature. The one represents a cause of action unknown to the common law, and is for the benefit of certain enumerated relatives of the person killed by another's negligence, or if no relatives are left to survive as set forth in the Act of Assembly, the right of action accrues to the representative of the estate for certain expenses incurred as a result of the injury which resulted in death. The other is not a new cause of action at all but merely gives to the personal representative of the deceased the right of action which accrued to the deceased at common law because of the tort or injury. These actions are cumulative and not authoritative, and it is, therefore, important that the two actions, the one under the death statutes and the other under the survival statutes, should not overlap or result in the duplication of damages and thereby compel a tort feasor to pay more than the maximum damage caused by his negligent act.

In connection with the Acts of Assembly above cited which refer to the statute of limitations where a person is injured through the contraction of a disease, such as silicosis, as a result or failure of a person in the manufacturing of goods to personally maintain premises in such a manner as to not cause injury to individuals residing near to said premises, it has been held that the cause of action commences to run from the time that the individual last experienced or was subject to the elements which caused the disease that brought about death. *Plazak, Appellant v. Allegheny Steel Co.*, 324 Pa. Supreme Court Reports 422.

In view of the authority just cited and construing the complaint in the instant case in a manner most favorable to the plaintiff, the deceased was last subject to the elements, which caused the disease and subsequent death, on April 30, 1939. It was, therefore, necessary that a cause of action be filed by her for the negligent acts complained of within two years and not thereafter from said date. In addition thereto, the Supreme Court of the State of Pennsylvania in the case of *Howard, Appellant, v. Bell Telephone Co.*, 306 Pa. Supreme Court Reports 518, held that where death occurs as a result of personal injury sustained through the negligence of another, and an action is filed in behalf of the heirs who are entitled to maintain an action, or by the Administrator for expenses incurred as a result thereof, said rights of action are derived from or dependent upon the existence of a right of action in the person who was injured at the time of his death. The cause of action contemplated by the statutes is the tort, the unlawful violence or negligence, and not the death caused by the tort. To construe said statutes in any other manner would give to the heirs or the administrator a greater right than the injured person would have had if said person would have been living.

It has further been held by the Supreme Court of Pennsylvania in the case of *McFadden, Appellant, v. May,* 325 Pa. Supreme Court Reports, 145, that where an action is filed by the heirs of a deceased person who died as a result of the negligence of another, or by the administrator for expenses incurred, in such an action the defendant may interpose any defenses which were available against the deceased person who died as a result of the alleged negligence of the defendant.

It, therefore, appears that the defense interposed in the motion to dismiss under the statute of limitations is proper, and since the cause of action of the deceased came into existence on April 30, 1939, and the Complaint was not filed until October 2, 1945, under the decisions of the Supreme Court of the Commonwealth of Pennsylvania, said cause of action is barred by the statute of limitations.

In view of the decisions of the Circuit Court of Appeals in this District and the Supreme Court of the United States that it is necessary for the federal court to accept the interpretations ascribed to state laws by the courts in the State where the cause of action arises, and to have uniformity exist as to causes of action under circumstances such as exist in this case, whether the action be filed in the state court or the federal court, the motion of the defendant to dismiss the complaint is sustained.

An appropriate order will be filed with this opinion.

Order Appealed From.

And now this 11th day of June, 1946, the motion of the defendant to dismiss the Complaint in the above entitled case is hereby granted for the reason that no cause or causes of action exist under the laws of the Commonwealth

of Pennsylvania in favor of the plaintiff, in either her individual or representative capacity, against the Franklin Plate Glass Corporation for the reason that said causes of action are barred by the statute of limitations.

WALLACE S. GOURLEY,
U. S. District Judge.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 9200 October Term, 1946.

IDA BERRY, Individually and as Administratrix of the Goods, Chattels and Credits of OLIVIA MARSHALL, Deceased,
Appellant,
vs.
FRANKLIN PLATE GLASS CORPORATION.

And afterwards, to wit, 7th day of April, 1947 come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Herbert F. Goodrich and Honorable Harry E. Kalodner, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 30th day of April, 1947 come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

UNITED STATES CIRCUIT COURT OF APPEALS

THIRD JUDICIAL CIRCUIT.

No. 9200 October Term, 1946.

IDA BERRY, Individually and as Administratrix of the Goods, Chattels and Credits of OLIVIA MARSHALL, Deceased,
Appellant,

vs.

FRANKLIN PLATE GLASS CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

Argued April 7, 1947

Before BIGGS, GOODRICH and KALODNER, *Circuit Judges.*

Opinion of the Court.

(Filed April 30, 1947.)

PER CURIAM:

The order of the court below dismissing the complaint will be affirmed.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 9200 October Term, 1946.

IDA BERRY, Individually and as Administratrix of the Goods, Chattels and Credits of OLIVIA MARSHALL, Deceased,
Appellant,

vs.

FRANKLIN PLATE GLASS CORPORATION,
Appellee.

Present: BIGGS, GOODRICH and KALODNER, *Circuit Judges.*

On appeal from the District Court of the United States, for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed with costs.

April 30, 1947.

BY THE COURT,
BIGGS,
Circuit Judge.

Endorsements:
Order affirming judgment, etc.

Received & Filed
April 30, 1947.

WILLIAM P. ROWLAND,
Clerk.

United States of America
Eastern District of Pennsylvania } *Sct.*
Third Judicial Circuit.

I, WM. P. ROWLAND, Clerk of the United States Circuit Court of Appeals for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the Appendix to Appellant's Brief (as constituting the portions of the Record before the Court at argument) and proceedings in this court in the case of Ida Berry, Individually and as Admx. of the Goods, Chattels and Credits of Olivia Marshall, Deceased, Appellant vs. Franklin Plate Glass Corporation, Appellee, (No. 9200) on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 20th day of June in the year of our Lord one thousand nine hundred and forty-seven and of the Independence of the United States the one hundred and seventy-first.

WM. P. ROWLAND,
(SEAL) *Clerk of the U. S. Circuit Court of Appeals,*
Third Circuit.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1947.

No. 218.

IDA BERRY, Individually and as Administratrix of the Goods, Chattels and Credits of OLIVIA MARSHALL, Deceased,

Petitioner-Plaintiff, Appellant,

vs.

FRANKLIN PLATE GLASS CORPORATION,

Respondent-Defendant, Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF.

FRANK W. STONECIPHER,
Attorney for Respondent.

1022 Farmers Bank Building,
Pittsburgh 22, Pa.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
JOSIAH SMITH CO., PENNSYLVANIA REPRESENTATIVE,
704 SECOND AVENUE, PITTSBURGH, PA.

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IN THE

Supreme Court of the United States

October Term, 1947.

No. 218.

IDA BERRY, Individually and as Administratrix of the Goods, Chattels and Credits of OLIVIA MARSHALL, Deceased,

Petitioner-Plaintiff, Appellant,

vs.

FRANKLIN PLATE GLASS CORPORATION,

Respondent-Defendant, Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF.

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1. Opinion Below.

The opinion of the District Court (Gourley, J.) was filed June 11, 1946 (Record, pages 9 to 23), reported in 66 Fed. Supp. 863.

The opinion of the Circuit Court of Appeals for the Third Circuit *(Per Curiam)* was filed April 30, 1947 (Record, page 24), reported in

2. Jurisdiction.

The basis on which jurisdiction of this Court is invoked does not appear in petitioner's Brief.

3. Statement of the Case.

Civil action brought by Ida Berry individually and as administratrix of the estate of Olivia Marshall, deceased, to recover damages by reason of her death. Action brought October 2, 1945. Decedent, who was a sister of the plaintiff, died November 10, 1944.

Complaint alleges that decedent died as result of exposure to silica and other ingredients from defendant's plant at Butler, Pennsylvania, the last exposure to which occurred in April, 1939, which caused her to remove to the City of New York, where she resided with the plaintiff until November 10, 1944, the date of her death. The only claim for damages contained in the complaint is an allegation of loss of services to the plaintiff (Par. 18th of the Complaint, Record, p. 7). The defendant filed motion to dismiss for the reason that the complaint fails to state a claim upon which relief can be granted. The reasons assigned in the motion were (Record, p. 3):

1. Bar of the Statute of Limitations.
2. Failure to show cause of action in Ida Berry individually.
3. Failure to show damage sustained by Ida Berry individually.
4. Failure to show damages for which the administratrix is entitled to maintain an action.

On June 11, 1946, Wallace S. Gourley, District Judge of the District Court for the Western District of Pennsylvania, filed opinion and order granting defendant's motion

to dismiss the complaint (Record, pp. 9-23). This opinion is reported in 66 Fed. Supp. 863.

The plaintiff appealed from the above order to the Circuit Court of Appeals for the Third Circuit at No. 9200 October Term, 1946. Appeal was argued before Biggs, Goodrich and Kalodner, Circuit Judges, April 7, 1947 (Record, p. 24). *Per Curiam* opinion filed April 30, 1947, affirming order of the District Court dismissing the Complaint (Record, p. 24).

4. Argument.

(a) Summary.

Right of action of Olivia Marshall, the decedent, for injuries sustained was barred by the two-year Pennsylvania Statute of Limitations more than three (3) years prior to her death. Petitioner concedes that she, in her individual capacity as a sister of the decedent, cannot recover because she is not a member of the classes permitted to recover under the Death Statute, namely, husband, widow, children or parents of the deceased. Petitioner also concedes that she cannot recover in her representative capacity under the Survival Statute because of the bar of the two-year Statute of Limitations in personal injury cases. Petitioner contends, however, that she is entitled to recover under the Amendment of 1937 to the Death Statute permitting personal representatives to recover for administrative, funeral expenses, etc. where decedent is not survived by a person of the classes entitled to recover. Respondent's position is that the right of action under the Death Statute, as amended, is *derivative* and therefore the bar of the Statute of Limitations as to such action prior to the date of the death operates as a bar of all rights of action under the Death Statute. This question is squarely decided by the Supreme

Court of Pennsylvania in *Howard v. Bell Telephone Co.*, 306 Pa. 518, 160 A. 613 (1932), citing and following decision of this Court in *Flynn v. N. Y. N. H. & H. R. R. Co.*, 283 U. S. 53 (1931). This decision, it is submitted, being a decision of the court of last resort of the state construing its own statutes, supersedes an earlier decision of the Third Circuit to the contrary in *Western Union Telegraph Co. v. Preston*, 254 Fed. 229 (1918) construing the same statute, which decision is in conflict with the reasoning of this Court in the *Flynn* case, *supra*.

(b) Petitioner, Sister of the Decedent, Individually has no Right of Action for the Death.

The Death Statute of Pennsylvania, Act of April 15, 1851, P. L. 669 (12 P. S. 1602), limits the persons entitled to recover for any injuries causing death to "the husband, widow, children, or parents of the deceased, and no other relatives." The provisions of this statute, as amended, are set forth in the opinion of the district court (Record, pp. 18, 19). Under the express language of the statute and the decisions of the Supreme Court of Pennsylvania construing it, a sister or other relative of a class not named in the statute cannot recover individually for the death: *Bause v. Kreiger*, 265 Pa. 395, 109 A. 128; *McFadden v. May*, 325 Pa. 145, 189 A. 483.

(c) There can be no Recovery under either the Death or Survival Statute of Pennsylvania because Claim of the Decedent was barred by the Two-Year Statute of Limitations of Pennsylvania prior to the Date of her Death.

The limitation of time within which the decedent could have brought an action in her lifetime was "two years from the time when the injury was done and not afterwards": Act of June 24, 1895, P. L. 236, Sec. 2 (12 P. S. 34).

In the case at bar the above limitation of two years began to run from the time of the last exposure of the decedent to the alleged noxious elements. As this exposure took place not later than April, 1939, the statute of limitations barred the action in April, 1941, more than three years prior to the death on November 10, 1944.

The above question is squarely decided in *Plazak v. Allegheny Steel Co.*, 324 Pa. 422, 188 A. 130. In this case it was held that in a common law action for injuries due to silicosis, the statute of limitations ran from the date of the last exposure while plaintiff was in the employ of the defendant.

It follows that if the plaintiff's action was *derivative,* that is, if it was dependent upon an existing cause of action in the injured party at the time of her death, plaintiff cannot recover. It also is clear that if the action is merely a continuation of the right of action of the decedent in her lifetime, there can be no recovery.

In Pennsylvania, where no suit has been brought by the injured party in his lifetime, the statutes provide for two actions which may be brought.

One of these actions is brought under the Act of June 2, 1937, P. L. 2755 (20 P. S. 321), which provides that—

> "Executors or administrators shall have power * * * to commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels: * * * "

An action brought under the above statute is merely a continuation of the right of action of the decedent in his lifetime, and the statute of limitations runs from the date of the injury to the decedent. This action is therefore barred in the present case because suit was not brought until long

after the two-year limitation expired: *Stegner, Admr. v. Fenton,* 351 Pa. 292, 40 A. 2d 473.

The measure of damages in an action brought under this statute is the pecuniary value of the life: *Pezzulli v. D'Ambrosia,* 344 Pa. 643, 26 A. 2d 659.

The Petitioner apparently concedes that her action cannot be maintained under the above survival statute. Petitioner further apparently concedes that she cannot recover under the death statute for damages sustained in her individual capacity.

The sole contention of the Petitioner, as we understand her argument, is that she can maintain her action in her capacity as administratrix "for reasonable hospital, nursing, medical, funeral expenses and expenses of administration" under the provisions of the amendment by Act of April 1, 1937, P. L. 196, to the death statute of 1851. This statute as amended is quoted in full in the opinion of the District Court (Record, pp. 18, 19).

It is submitted that there can be no recovery under the amendment of 1937 for the reason that the right of action under the death statute is derivative and therefore action cannot be maintained thereunder where the right of action of the injured party was barred at the time of her death.

The above question is, we submit, squarely decided in *Howard v. Bell Telephone Co.,* 306 Pa. 518, 160 A. 613, by the Supreme Court of Pennsylvania, which is the court of last resort in that state, in 1932. The Supreme Court in opinion by Mr. Justice Drew, said at p. 523:

> "Therefore, while the right of action given by the statute to the widow is a new one, it is dependent upon the existence of a right of action in the husband at the time of his death. The statute cannot be construed to give the widow a greater right than the husband would have if living. The plaintiff's husband extinguished his

> right of action by failing to assert it within the two year period fixed by the statute. A right of action can be extinguished as effectively by the statute of limitations as in any other way. In this case it was an absolute bar to action by the husband for many years prior to his death. From the time his action was barred, there was nothing the statute could act upon to preserve a right for the widow. There could be no preservation of a right which had ceased to exist. The logic of the situation will bear no other conclusion. To hold otherwise would be to say that a right of action which was legally dead could be revived by the death of the injured person, so as to pass a right of action to his widow or heirs."

While this case was decided prior to the amendment of 1937, the reasoning of that case and the basic principles upon which it was decided, namely, that the right of action under the death statute was derivative and therefore where the original right of action was legally dead it could not be revived by the death of the injured person so as to pass a right of action to the persons named in the statute, is clearly applicable to an action for expenses brought by the personal representative under the amendment of 1937.

The cases decided since the amendment of 1937 clearly show that the amendment is a death statute and actions arising thereunder are therefore derivative and subject to the same limitations as those arising under the original statute.

Funk v. Buckley & Company, Inc., et al., 158 Pa. Superior Ct. 586, 45 A. 2d 918 (footnote at p. 590):

> "The Act of April 1, 1937, P. L. 196, sec. 1, 12 PS sec. 1602, is also a wrongful death statute. Under it the personal representatives of the decedent may institute suit for hospitalization, funeral and administration expenses where no spouse, child or parent survives. For an illuminating analysis and comparison of all the

death and survival statutes cited in the opinion, see Goodrich-Amram Annotations sections 2201-1 to 2201-40."

In *Goodrich-Amram Annotations,* section 2201-13, the following appears:

> "The limitations which the decisions just discussed have placed around the true action for wrongful death will in all probability be held equally applicable to the action for wrongful death brought by the personal representative of the decedent to recover hospitalization, funeral and administration expenses."

Staggers v. Dunn-Mar Oil & Gas Company, 312 Pa. 269, 167 A. 785. Claim of father for maintenance, medical treatment and funeral charges for his son held derivative and barred because the son's claim was barred by the Workmen's Compensation Act.

Klingseisen v. Costanzo Transp. Co., 101 F. 2d 902, (C. C. A., Third Circuit, 1939). Amendment of 1937 cited and claim held to be derivative and barred by decedent's contributory negligence.

The amendment clearly does not give a cause of action of a different character and subject to different limitations to the personal representatives where none of the parties named in the statute survives. The amendment clearly relates to the same subject matter, namely, "injuries causing death". These identical words are used both in the original statute and the amendment. It cannot be supposed that the legislature intended an entirely different rule to be applied in construing the amendment than that applicable to the original statute.

An intention to alter period of limitation will not be inferred unless clearly expressed: *Miller v. Commonwealth,* 5 W. & S. 488 (Pa.).

A proviso annexed to a statute by amendment, moreover, must be construed in accordance with the principles governing construction of the original statute, as it becomes part of that statute: *Commonwealth to use v. Barrett,* 304 Pa. 13, 155 A. 95.

(d) The Decisions of the Court of Last Resort of the State are Binding upon the Federal Courts.

It is submitted that the decision of the court of last resort of Pennsylvania in the Howard case construing the Pennsylvania statute is binding upon the Federal Courts even though it is in conflict with an earlier decision of the Third Circuit in *Western Union Telegraph Company v. Preston,* 254 Fed. 229 (1918), construing the same statute.

This principle was applicable to the construction of statutes where jurisdiction, as in the case at bar, depended entirely upon diversity of citizenship, even prior to the decision of this Court in *Erie Railroad Co. v. Tompkins,* 304 U. S. 654, 64 S. Ct. 817.

This duty arises under Section 34 of the Judiciary Act of 1789, 28 U. S. C. A. 725.

The Federal Courts will disregard their own former decisions construing a state statute if the state courts have *subsequently* given it a different construction.

Town of Enfield v. Jordan, 119 U. S. 680, 7 S. Ct. 358.

In *Guaranty Trust Company of New York v. York,* 326 U. S. 99, 65 S. Ct. 1464, it was held, following the Tompkins case, that even in equity cases the Federal Courts were bound to follow a state statute of limitations. In that case, this Court said at p. 108, that—

"A federal court adjudicating a state created right solely because of the diversity of citizenship of the parties is, for that purpose, in effect only another court of the state • • • "

See also: *Angel v. Bullington*, 326 U. S. 713, 67 S. Ct. 657, AND —— U. S. ——.

Holmberg v. Armbrecht, 327 U. S. 392, 66 S. Ct. 582.

(e) There is no Violation of the Fourteenth Amendment.

The contention that the construction placed upon the statutes by the Supreme Court of Pennsylvania and the courts below is in violation of the Fourteenth Amendment of the Constitution of the United States is clearly without merit. The right to recover for injuries resulting in death did not exist at common law and is created solely by the statutes of Pennsylvania. The statutes applicable were all in effect prior to the time the alleged cause of action arose.

The Supreme Court of Pennsylvania in construing the death claim as derivative did not deprive the person entitled of any vested right. It simply applied a limitation statute in the same manner that the Supreme Court of the United States applied a similar limitation in the case of *Flynn v. N. Y. N. H. & H. R. R. Co.*, 283 U. S. 53, above cited.

In *Guaranty Trust Company of New York v. York*, 326 U. S. 99, 65 S. Ct. 1464, cited by the petitioner in support of this proposition, it was held that since *Erie R. R. Co. v. Tompkins, supra*, the Federal Courts were bound to follow a state statute of limitations and its application to equity proceedings as construed by the decisions of the state court to an equity proceeding in the Federal Courts.

In *Chase Securities Corp. v. Donaldson*, 325 U. S. 312, 65 S. Ct. 1137, it was held that a statute lifting the bar of the statute of limitations was not a violation of the Fourteenth Amendment.

Statutes of limitations with respect to causes of action arising after their effective date have been upheld by the courts of all jurisdictions.

United States v. Oregon Lumber Co., 260 U. S. 299, 43 S. Ct. 100, at page 299, and cases cited therein.

(f) Conclusion.

It is respectfully submitted that the decision of the court below is clearly in accord with and properly applies the decisions of the Supreme Court of Pennsylvania in holding that the petitioner's claim is derivative and therefore barred by the statute of limitations with respect to personal injury actions which had run long prior to decedent's death. Jurisdiction of the case is based solely upon diversity of citizenship. There is clearly no violation of the Fourteenth Amendment by reason of the construction of the statutes of Pennsylvania placed upon them by the Supreme Court of Pennsylvania and the lower courts.

The decision of the court below involves a construction of state statutes and is in accord with the decisions of the court of last resort of the state. The principles of construction are in accord with those of this Court in construing similar statutes. There is no federal question of substance presented.

It is submitted that the writ of certiorari should be denied.

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Attorney for Respondent.